IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 17 OF 2005

MRS. TEREZA R.D'SA(DEC.) THROUGH L.RS., ...Appellants

Versus

MRS. NOEMIA M.DE SOUZA(DEC.) THROUGH L.RS., ...Respondent

Mr. J.E. Coelho Pereira, Senior Advocate with Ms. B. Bhise, advocate for the appellants.

Coram:- R. M. LODHA, J.

Date:- 22nd September, 2005

P.C.

Heard Mr. J. E. Coelho Pereira, the learned Senior Counsel for the appellants.

Two-fold submission has been advanced by the learned Senior Counsel. First, he submitted that the averments made in the plaint do not specifically set out that the plaintiffs had been using the suit way as of right peacefully, openly and without interruption for the past 30 years. Relying upon the Judgment of the Supreme Court in the case of "Justiniano Antao & Ors. vs. Bernadette B. Pereira (Smt.)", (2005) 1 S.C.C. 471, the learned Senior Counsel would urge that for want of any specific averment, the suit must fail. Second, the learned Senior counsel contended that the evidence led by the plaintiffs does not prove that they have acquired right of way by prescription. In other words, the learned Senior Counsel submitted that the finding by the Appeal Court that the plaintiffs had been able to prove that they have acquired right of way by way of easement of prescription was founded on no legal evidence by both the courts below.

None of the submissions impresses me. Insofar as the first submission is concerned, paragraph 14 of the plaint would show that the plaint

contains the requisite pleading. Paragraph 14 reads thus:-

> "The abovementioned way is apparent, visible and has been enjoyed in its present condition by the plaintiff and her family members for more than 50 years to the knowledge of this plaintiff and her family members. Earlier to that it was being enjoyed in the same fashion by her ancestors."

The aforesaid pleading in the plaint is categorical that the plaintiffs and their family members had been using the suit way for more than 50 years to the knowledge of the plaintiffs and their family members and prior thereto it had been enjoyed in the same way by their ancestors. The pleadings thus reflect that the plaintiffs set up the case that they had been using the suit way as of right peacefully and openly and without any interruption for more than 50 years. The case in hand is governed by the then Civil Code applicable to the State of Goa prior to the enforcement of the Indian Easement Act and as per the said law for acquisition of right of way by prescription it has to be shown that the said way has been used for the last 30 years peacefully, openly and without any interruption. The pleadings meet the requriement of law and cannot be said to be deficient in any manner.

As regards the second contention, it is mistaken supposition on the part of the learned Senior Counsel for the appellants that there is no legal evidence to support the finding that the plaintiffs have acquired right to the suit way by easement of prescription. The evidence of P.W.1 clearly establishes the plaintiffs' case. In paragraph 20 of the impugned Judgment, the Appeal Court has appreciated, analysed and scanned the evidence of P.W.1. The finding recorded by the Appeal Court is concluded on facts. In Second Appeal, this Court does not have jurisdiction to re-appraise the evidence.

No substantial question of law arises.

The Second Appeal is dismissed in limine.

R. M. LODHA, J.

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